RECEIVED
MAY 16 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Case No. 80-1764

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

STATE OF FLORIDA,

Petitioner,

vs.

JOHN HENRY MORSMAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

WILLIAM C. McLAIN
ASSISTANT PUBLIC DEFENDER

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER

Hall of Justice Annex
495 N. Carpenter Street
Bartow, Florida 33830
(813)533-6715 or 533-1184

Counsel for Respondent

10

TOPICAL INDEX TO BRIEF

	PAGE NO.
REASONS WHY THE WRIT SHOULD BE DENIED	
1. The Decision Of The Florida Supreme Court Does Not Raise An Important Federal Question Involving Privacy Expectations.	1
2. The Decision Of The Supreme Court Of Florida Does Not Conflict With Decisions Of The Supreme Court Of The United States And Federal Courts Of Appeal On Whether Open Fields Are Inevitably Associated With Privacy Expectations.	2
3. Whatever Decision This Court Makes If It Accepts Jurisdiction In This Case Will Have No Practical Effect On Respondent.	4
CERTIFICATE OF SERVICE	6

TABLE OF CITATIONS

CASES CITED:	PAGE NO.
Arkansas v. Sanders 442 U.S. 753 (1979)	1,2
Carroll v. United States 267 U.S. 280 (1925)	1
Hodges v. United States 243 F.2d 281 (C.A.5, 1957)	3
Katz v. United States 389 U.S. 347 (1967)	2
Lightfoot v. State 356 So.2d 331 (Fla.4th DCA 1978)	2
United States v. Baile 569 F.2d 1053 (9th Cir. 1978)	3
United States v. Johnson 561 F.2d 832 (D.C.Cir. 1977)	4
United States v. LaBerge 267 F.Supp. 686 (D.MD. 1967)	3
United States v. Van Dyke No. 79-5101 (C.A.4, opinion filed Feb. 26, 1981)	4
United States v. Williams 581 F.2d 451 (C.A.5, 1978)	3

Case No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

STATE OF FLORIDA,

Petitioner,

vs.

JOHN HENRY MORSMAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

The Respondent, John Henry Morsman, respectfully asks this Court to deny the Petition for Certiorari, seeking review of the Florida Supreme Court's opinion in that case. That opinion is reported at 394 So.2d 408.

Reasons Why The Writ Should Be Denied

1. The Decision Of The Florida Supreme Court Does Not Raise An Important Federal Question Involving Privacy Expectations.

Respondent initially questions whether the Petitioner's issue, whether a backyard is "one of those areas inevitably associated with privacy expectations," is a substantial question requiring this Court's attention. The guiding principles concerning reasonable expectations of privacy have been articulated by this Court in such cases as Arkansas v. Sanders, 442 U.S. 753 (1979); Carroll v. United

States, 267 U.S. 280 (1925) and others. This Court, therefore, need not decide every factual variation on the themes presented in cases such as this one. See, Arkansas v. Sanders, supra (Blackmon, dissenting).

Moreover, this case does not clearly raise the important federal question petitioner claims it raises. That is, contrary to petitioner's claim, the Florida Supreme Court did not say that a backyard is inevitably associated with a right to privacy. The Florida Supreme Court made this clear when it distinguished Lightfoot v. State, 356 So.2d 331 (Fla. 4th DCA 1978) from the case at Bar. It noted that the policeman in Lightfoot saw the marijuana in the defendant's backyard from a neighbor's yard and did not have to go into his yard to see it as they had to do in this case. Thus, the Florida Supreme Court has not said that a backyard is inevitably associated with a privacy expectation but, depending upon the facts of the particular case, a person may have a reasonable expectation of privacy in his backyard. Even the dissent in this case recognized this point when it quoted Katz v. United States, 389 U.S. 347,351 (1967)

> "What a person knowingly exposes to the public, even in his own home or office is not a subject of Fourth Amendment protections."

The issue petitioner raises, therefore, is either of insufficient importance for this Court to consider or was unaddressed by the Florida Supreme Court.

2. The Decision Of The Supreme Court Of Florida Does Not Conflict With Decisions Of The Supreme Court Of The United States And Federal Courts Of Appeal On Whether Open Fields Are Inevitably Associated With Privacy Expectations.

Despite petitioner's insistence, this case does not involve the nebulous "open fields" doctrine. The Florida Supreme Court, in the first place did not hold that "...a

backyard, ipso facto, is inevitably associated with privacy expectations,...." (Petitioner's Brief on Jurisdiction, pg. 7) Second, calling Respondent's backyard an "open-field" and thus without Fourth Amendment protections, Hodges v. United States, 243 F.2d 281,283 (C.A.5, 1957), is certainly a novel way to classify Respondent's backyard. A backyard is usually part of the curtilage or part of the "...area of domestic use immediately surrounding a dwelling...." United States v. LaBerge, 267 F.Supp. 686,692 (D.MD 1967). Respondent, moreover, is unaware of any case calling a backyard an "open field." The cases petitioner cites as conflicting with this case certainly do not say that. For example, in United States v. Baile, 569 F.2d 1053 (9th Cir. 1978) customs agents, patrolling the Mexican Border, followed some footprints onto the defendant's property. There they came upon a virtual junkyard of cars (one of which had marijuana in it) about 100 yards from the defendant's house. Id, at 1055. The court there said that because the truck with the marijuana was outside the dwelling and its curtilage, the defendant had no reasonable expectation of privacy in the open fields where the truck was found. Id, at 1056.

In United States v. Williams, 581 F.2d 451 (C.A.5, 1978) two agents of the Bureau of Alcohol, Tobacco, and Firearms crossed onto the defendant's property and eventually smelled the odor of moonshine liquor coming from a shed within a hogpen, fifty yards from two houses, one of which belonged to the defendant. The appellate court said the shed in the hogpen was part of the house's curtilage, Id, at 454, but justified the agent's trespass on the grounds that they "had merely approached the back wall of an extreme outbuilding across open fields." Id, at 454.

These two cases, therefore, are easily distinguishable from the case at Bar. Here there are no great expanses of 50

or 100 yards between some illegal activity and the dwelling and curtilage to justify calling a backyard an open field. And while the expectation of privacy is the focus of whether or not the Fourth Amendment applies, distances are a factor in determining the reasonableness of some expectation of privacy. United States v. Van Dyke, No. 79-5101 (C.A.4th, opinion filed February 26, 1981).

Thus, the open fields doctrine, like the frontier and unfenced prairie, is a relic from a more open, less crowded day. Such notions are best treated as historical oddities than contorted to face a more congested age.

Finally, Petitioner cites United States v. Johnson, 561 F.2d 832 (D.C.Cir. 1977). Petitioner, however, overstates the court's holding in that case by saying that the police trespass of two or three feet onto the defendant's property to look into a lighted window was a trespass "on the open field area surrounding the house...." (Petitioner's Brief on Jurisdiction pg. 11) The court made no such holding; it did not even mention the open fields doctrine. What it said was that the two or three foot intrusion only amounted to a deminimus violation of defendant's protected interests. Walking from the front door to the backyard, as the officer did is surely more than the technical trespass that occurred in Williams.

Petitioner, therefore, has been unable to show any conflict between this case and the cases he cites as conflicting with the decision of the Florida Supreme Court.

3. Whatever Decision This Court Makes If It Accepts Jurisdiction In This Case Will Have No Practical Effect On Respondent.

The trial court, after denying Respondent's motion to suppress, accepted his change of plea, and found him guilty of possessing marijuana. The court then sentenced him to one year probation and fined him $200. No stay of that order was entered. Thus, if this court accepts jurisdiction over his case, Respondent will only lose two hundred dollars, having

long since have served his probationary period. Thus, whatever decision this court may render in his case will have no practical effect on either the Petitioner or Respondent.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: William C McLain
WILLIAM C. McLAIN
ASSISTANT PUBLIC DEFENDER

Hall of Justice Annex
495 N. Carpenter Street
Bartow, Florida 33830
(813)533-6715 or 533-1184

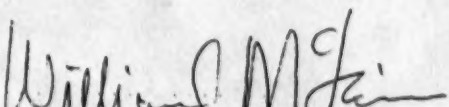
Counsel for Respondent.

CERTIFICATE OF SERVICE

I, WILLIAM C. McLAIN, a member of the Bar of the Supreme Court of the United States and counsel of record for JOHN HENRY MORSMAN, the Respondent, hereby certify that on May 14, 1981, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Respondent's Brief In Opposition To The Petition For Writ Of Certiorari To The Supreme Court Of Florida, on each of the parties as follows:

On the State of Florida, the Petitioner, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to CHARLES CORCES, JR., Assistant Attorney General, as counsel for Petitioner, at Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602.

All parties required to be served have been served this date, May 14, 1981.

BY: 

WILLIAM C. McLAIN
Assistant Public Defender

RECEIVED
MAY 18 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 80-1764

STATE OF FLORIDA,

Petitioner,

vs.

JOHN HENRY MORSMAN,

Respondent.

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

The Respondent, JOHN HENRY MORSMAN, through his undersigned counsel and pursuant to United States Supreme Court Rule 46, asks this Court for leave to proceed in forma pauperis. The Respondent has been represented by appointed counsel throughout his state court proceedings, and his Affidavit in support of this Motion is attached.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY: William C. McLain
WILLIAM C. McLAIN
ASSISTANT PUBLIC DEFENDER

Hall of Justice Annex
495 N. Carpenter Street
Bartow, Florida 33830
(813)533-6715 or 533-1184

Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

CASE NO.

STATE OF FLORIDA,

Petitioner,

vs.

JOHN HENRY MORSMAN,

Respondent.

AFFIDAVIT

I, JOHN HENRY MORSMAN, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the Respondent in the above-entitled case.

2. Because of my poverty, I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. The nature of said cause is briefly stated as follows:

I was convicted of possession of marijuana and was placed on one year's probation and fined two hundred dollars ($200). Florida's Second District Court of Appeal reversed the trial court's order denying my motion to suppress and the

Florida Supreme Court affirmed the Second District Court of Appeals ruling. I am now the Respondent in the State of Florida's Petition for a Writ of Certiorari to the Supreme Court of the United States.

JOHN HENRY MORSMAN

Duly witnessed and sworn to before me a Notary Public this 29 day of April, 1981.

Virginia A. Slaven
Notary Public

My Commission Expires:

Notary Public, State of Florida at Large
My Commission Expires August 14, 1983

CERTIFICATE OF SERVICE

I, WILLIAM C. McLAIN, a member of the Bar of the Supreme Court of the United States and counsel of record for JOHN HENRY MORSMAN, the Respondent, hereby certify that on May 14, 1981, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Motion For Leave To Proceed In Forma Pauperis, with attached affidavit, on each of the parties as follows:

On the State of Florida, the Petitioner, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to CHARLES CORCES, JR., Assistant Attorney General, as counsel for Petitioner, at Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602.

All parties required to be served have been served this date, May 14, 1981.

BY: William C. McLain
WILLIAM C. McLAIN
Assistant Public Defender